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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/618,803	07/14/2003	Linda Najdek	98.22US-CON	5789
7590 Estee Lauder Companies 125 Pinelawn Road Melville, NY 11747			EXAMINER FISHER, ABIGAIL L	
			ART UNIT 1616	PAPER NUMBER
			MAIL DATE 07/18/2008	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/618,803

Applicant(s)

NAJDEK ET AL.

Examiner

ABIGAIL FISHER

Art Unit

1616

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 June 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires 6 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 23 June 2008. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.

12. ☒ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). 6/23/08

13. ☐ Other: _____.

/Mina Haghighatian/
Primary Examiner, Art Unit 1616

Continuation of 11. does NOT place the application in condition for allowance because: for the reasons stated in the Office action mailed on December 28 2007. Applicants argue that (1) that the '155 reference suggest that the protective colloid would not be needed for relatively small amounts such as that amount exemplified in '496 of 0.05%. Applicants further argue that there is no disclosure or suggestion that introducing substantial amount of pigment would be desirable. Applicants argue that (2) introduction of a further stabilizing/dispersing agent is counterintuitive and that adding these sort of ingredients would negatively affect the properties of the '496 composition, in particular the demixing capability of the composition. Applicants argue that (3) the effectiveness of the cationic polymer is slight and that the instant invention and the '758 reference rapidly mix and demix. Applicant argues that (4) formulating a stable emulsion is a formidable task and that without some predication as to the behavior of that ingredient in stable emulsion that the incorporation of that ingredient would not upset the delicate balance achieved in the stable emulsion. Regarding applicants' first argument, the '496 references indicates that colorants, which are common in the art can be added. While they only exemplify one percentage this does not mean that only one percentage is acceptable. One of ordinary skill in the art would have been motivated to optimize the amount of colorant added depending on the desired color of the product. As taught by the '155 reference, when incorporating higher amounts (1% or greater) of pigment it is advantageous to add a protective colloid to maintain the pigment in suspension. Therefore, one of ordinary skill would have been motivated to add this component. Regarding applicants' second argument, it is unclear to the examiner how the addition of the protective colloid is counterintuitive. This component is added to a dual phase composition to maintain the pigment in suspension. It is unclear how maintaining the pigment in suspension affects the compositions ability to demix. "The arguments of counsel cannot take the place of evidence in the record." In re Schulze, 346 F.2d 600, 145 USPW 716, 718 (CCPA 1965), In re Huang, 40 USPQ 2d 1685 (Fed. Cir. 1996), In re De Blauwe et al., 222 USPQ 191, (Fed. Cir. 1984). Applicant has not proved any factual evidence establishing unobviousness. Regarding applicants' third argument, the '758 utilizes cationic surfactants as the demixing agents, therefore one of ordinary skill in the art would have a reasonable expectation that the cationic polymers of the '095 reference would behave the same way when incorporated into the '758 reference. Regarding applicants' fourth argument, the '758 reference clearly indicates that cationic surfactants can be utilized in the invention, therefore one of ordinary skill in the art would not expect that they would upset the delicate balance achieved in a stable emulsion. Furthermore, applicants' have not provided any factual evidence that the incorporation of the cationic polymers of '095 into the composition of '758 would result in an unstable composition. .